

2011 DRAFTING REQUEST

Bill

Received: **01/09/2012**

Received By: **agary**

Wanted: **As time permits**

Companion to LRB:

For: **Jason Fields (608) 266-3756**

By/Representing: **Cory**

May Contact:

Drafter: **agary**

Subject: **Bus. Assn. - corporations**
Bus. Assn. - miscellaneous

Addl. Drafters:

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Fields@legis.wisconsin.gov**

Carbon copy (CC:) to: **aaron.gary@legis.wisconsin.gov**

Pre Topic:

No specific pre topic given

Topic:

Benefit corporations

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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/P1	agary 01/26/2012	csicilia 02/02/2012	rschluet 02/02/2012	_____	mbarman 02/02/2012		State
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3-19-12

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Mc w/ Cory - Rep. Fields 6-3756 1/9

- ~~defining~~ defining a benefit corporation →
for companies with a purpose of creating
a general public benefit
 - can identify themselves as
benefit corporations for
potential investors
 - will send me the info.

Gary, Aaron

From: Palmer-Rehorst, Corey
Sent: Monday, January 09, 2012 9:24 AM
To: Gary, Aaron
Subject: Rep. Fields draft request

Attachments: Model_Legislation.pdf

Aaron,

Please find attached the model legislation Rep. Fields would like drafted regarding the creation of a new kind of corporation, a Benefit Corporation. Additional information regarding the legal implications of this type of legislation can be found at <http://www.bcorporation.net/resources/bcorp/documents/Benefit%20Corporation%20-%20Legal%20Provisions%20and%20FAQ.pdf>

Thank you for your help. Let us know if there is anything that needs further clarification along the way.

Corey

Corey Palmer-Rehorst
Office of Rep. Jason Fields
304 West State Capitol
P.O. Box 8953
Madison, WI 53708
(608)266-3756



Model_Legislation
.pdf (333 KB)...



Benefit Corporation – Legal Provisions and FAQs

Four states, Maryland, Vermont, New Jersey, and Virginia have recently passed legislation creating a new kind of corporation, a Benefit Corporation, giving entrepreneurs and investors an additional choice when determining which corporate form is most suitable to achieve their objectives. A Benefit Corporation: 1) has a corporate purpose to create a material positive impact on society and the environment; 2) has an expanded fiduciary duty that requires consideration of non-financial interests when making decision; and 3) reports on its overall social and environmental performance as assessed against a third party standard.

Benefit Corporation -- Major Provisions

Purpose

- ✓ shall create general public benefit defined as a material positive impact on society and the environment, taken as a whole, as assessed against a third party standard
- ✓ shall have right to name specific public benefit purposes (e.g. 50% profits to charity, carbon neutral, 100% local sourcing, beneficial product to customers in poverty)
- ✓ the creation of public benefit is in the best interests of the Benefit Corporation

Accountability

- ✓ directors' duties are to make decisions in the best interests of the corporation
- ✓ directors and officers shall consider effect of decisions on shareholders and employees, suppliers, customers, community, environment (together the "Stakeholders")
 - not required to give priority to any particular stakeholder
 - have discretion to give priority to particular stakeholders consistent with general and any specific public benefit purposes
 - the same fiduciary duty must be met for day to day operating decisions and questions of liquidity/change of control

Transparency

- ✓ shall publish annual Benefit Report in accordance with a third party standard for defining, reporting, and assessing social and environmental performance, including assessment of successes and failures in achieving general and specific public benefit purpose and in considering effects of decisions on stakeholders
- ✓ third party standard defined as being comprehensive, credible, independent, and transparent
- ✓ Benefit Report delivered to: 1) all shareholders; 2) to public website with exclusion of proprietary data; and 3) Secretary of State with exclusion of proprietary data

Right of Action

- ✓ only shareholders and directors have right of action
- ✓ no third party right of action
- ✓ if Benefit Corporation is a subsidiary, >5% owners of parent have right of action
- ✓ Right of Action can be for 1) violation of or failure to pursue general or specific public benefit; 2) violation of duty or standard of conduct; 3) failure to meet transparency requirements

Change of Control/Purpose/Structure

- ✓ shall require 2/3 majority vote with dissenters rights

Benefit Corporation – FAQs

Why would a company want to become a Benefit corporation?

- ✓ Provides clarity to directors and officers that their fiduciary duty includes pursuing the creation of a material positive impact on society and the environment, even in liquidity scenarios;
- ✓ Offers safe harbor to its directors and officers to consider the interests of its workforce, its community, and the environment when making decisions, even in liquidity scenarios;
- ✓ Increases accountability to investors interested in a broader mission by 1) expanding shareholder rights to enforce this expanded definition of fiduciary duty and standard of consideration; and 2) requiring a 2/3 super-majority vote of shareholders to remove these higher standards;
- ✓ Differentiates the company in a confusing marketplace in which everyone is claiming to be a responsible or green business;

What are the legal impediments today preventing businesses from operating this way?

- ✓ The greatest impediments exist in liquidity scenarios.
 - When a company is 'in play,' directors' discretion under the business judgment rule is narrowed as a result of the Revlon ruling in Delaware, requiring them to 'take the highest offer' regardless of the impact of that decision on non-financial interests. Even states with constituency statutes lack any case law in conflict with the Revlon decision.
- ✓ Impediments also exist in operating scenarios.
 - The best interests of the corporation are commonly equated with the financial interests of shareholders. Any decision by directors must be tied back to serving the financial interests of shareholders. This prevents directors from making decisions that consider both financial and non-financial interests. Milton Friedman's seminal article stating that 'the social responsibility of business is to increase profits' has been absorbed into U.S. corporate culture and impacts how decisions are made.

In states with a constituency statute, can't companies already do this?

- ✓ Constituency statutes are permissive and as a result directors 'may' consider non-financial interests. This also means that they 'may not'. The objective of Benefit corporation legislation is to give shareholders the option to choose to require directors to consider non-financial interests.
- ✓ Constituency statutes have not achieved the other objectives of this legislation cited above.

Why require the creation of 'general public benefit' rather than simply require the creation of one or more 'specific public benefits'?

- ✓ Most importantly, responding to market demand from entrepreneurs, investors, consumers, and policy makers, the primary objective of this legislation is to create a new corporate form whose corporate purpose is to create benefit for society generally as well as shareholders.
- ✓ The 'general public benefit' purpose helps prevent abuse of this legislation by corporations interested in green-washing. Without the 'general public benefit' purpose, a corporation could name a single, narrow

'specific public benefit' purpose (e.g. keeping the river in back of the factory clean from toxic effluents) and then 'consider' and dismiss all other non-financial interests when making decisions.

Without more prescriptive performance standards than simply "creating a material positive impact on society and the environment", isn't this just a legalized form of green-washing?

- ✓ No. A company deciding to become a Benefit corporation has voluntarily agreed to meet higher standards of corporate purpose, accountability, and transparency about its overall business and operations, not simply in one specific area.
- Benefit corporations have incremental legal exposure to shareholders and directors who can bring a lawsuit for 1) failure to pursue a material positive impact on society and the environment as assessed against a third party standard; 2) violation of duty or standard of conduct to consider non-financial interests when making decisions; or 3) failure to meet the transparency requirements of the statute
- Benefit corporations are required to publish publicly an annual Benefit report on its overall social and environmental performance as assessed against a third party standard

Are there many third party standards for assessing overall corporate social and environmental performance?

- ✓ Yes. There are many third party standards organizations that meet the statutory criteria for a third party standard.
- ✓ The management, and ultimately, directors and shareholders, of Benefit Corporations are free to decide for themselves which of these or other standards they feel meet the statutory requirements and their needs.
- ✓ The Global Reporting Initiative (GRI), GreenSeal, Underwriters Laboratories (UL), ISO2600, Green America, and B Lab are a few well-known examples. In addition to the examples listed above, more than 100 'raters' of corporate sustainability practices are listed in the 'Rate the Raters' report published by the research and consulting firm SustainAbility. This list is available for free at <http://www.sustainability.com/library/rate-the-raters-phase-two>.

Won't preparing the annual Benefit report be overly costly and burdensome?

- ✓ No. Benefit Corporation legislation does not require a Benefit Corporation to use any particular third party standard to prepare its benefit report. Nor are they required to have that report certified or audited by a third party.
- ✓ Both GRI and B Lab offer companies the use of their reporting (GRI) and assessment (B Lab) tools for free. Particularly for smaller companies most likely to adopt Benefit corporation status, using B Lab's free Impact Assessment to generate an impact report generally takes only 1-2 hours. Over 1,000 companies are already issuing reports on their corporate social and environmental performance in accordance with GRI reporting standards and more than 1,000 companies are using B Lab's Impact Assessment.

What might a general counsel tell the Board they must do to meet the 'shall consider' standard of conduct?

- ✓ The board minutes of a Benefit corporation should show that the directors discussed the impacts of their decisions on the interests they are required to consider and that they were supplied with any information they requested to inform their consideration of those interests. When a material decision required the

Board to balance competing interests, the minutes, and the narrative statement in the annual Benefit report, should indicate how the Board reached its decision and the considerations that led to the decision.

What might a general counsel tell the Board they must do to meet the 'public benefit' standard?

- ✓ It is expected that case law will develop on the question of whether a Benefit corporation has met its 'public benefit' standard, and will likely consider both 1) how the directors considered the impact of their decisions on both financial and non-financial interests (i.e., the process followed) and 2) the level of performance demonstrated in the third party assessment of the corporation's social and environmental performance presented in the annual Benefit report (i.e., the results obtained).

Can Directors be held personally liable for monetary damages for failure of the Benefit Corporation to create general or specific public benefits?

- ✓ No. The law specifically states: "A director is not personally liable for monetary damages for failure of the benefit corporation to create general or specific public benefits."

Do Benefit Corporations have any special tax status?

- ✓ No. Benefit Corporations are treated like any other corporation for tax purposes.

For more information, contact thelab@bcorporation.net or check www.bcorporation.net.

MODEL BENEFIT CORPORATION LEGISLATION

With Explanatory Comments¹

[Chapter] __ Benefit Corporations

Subchapter

1. Preliminary Provisions
2. Corporate Purposes
3. Accountability
4. Transparency

Subchapter 1 Preliminary Provisions

Section

101. Application and effect of chapter.
102. Definitions.
103. Formation of benefit corporations.
104. Election of status.
105. Termination of status.

§ 101. Application and effect of chapter.

(a) **General rule.** – This [chapter] shall be applicable to all benefit corporations.

(b) **Application of business corporation law generally.** – The existence of a provision of this [chapter] shall not of itself create an implication that a contrary or different rule of law is applicable to a business corporation that is not a benefit corporation. This [chapter] shall not affect a statute or rule of law that is applicable to a business corporation that is not a benefit corporation.

(c) **Laws applicable.** – Except as otherwise provided in this [chapter], [the business corporation law] shall be generally applicable to all benefit corporations. The specific provisions of this [chapter] shall control over the general provisions of [the business corporation law]. A benefit corporation may be simultaneously subject to this [chapter] and one or more other [statutes that provide for the incorporation of a specific type of business corporation, such as a professional corporation].

¹ For a detailed discussion of the issues to be considered when preparing legislation for introduction in a state see Clark et al, *The Need and Rationale for the Benefit Corporation* (2011), available at www.benefitcorp.org.

(d) **Organic records.** – A provision of the articles or bylaws of a benefit corporation may not relax, be inconsistent with or supersede a provision of this [*chapter*].

Comment:

This chapter authorizes the organization of a form of business corporation that offers entrepreneurs and investors the option to build, and invest in, businesses that operate with a corporate purpose broader than maximizing shareholder value and a responsibility to consider the impact of its decisions on all stakeholders, not just shareholders. Enforcement of those duties comes not from governmental oversight, but rather from new provisions on transparency and accountability included in this chapter.

The last sentence of subsection (c) makes clear that if a state provides for the incorporation of specialized types of business corporations, such as statutory close corporations, insurance corporations, or professional corporations, those corporations may also be benefit corporations. In the case of a professional corporation, section 201(e) provides a special rule that eliminates any conflict between this chapter and the requirement found in many professional corporation laws that limit the purposes or business of a professional corporation to providing a particular type of professional service.

As a result of subsection (d), a corporation that elects to be subject to this chapter will be subject to all of the provisions of the chapter and will not be able to vary their application to the corporation.

The term “benefit corporation” used in this section is defined in section 102.

§ 102. Definitions.

(a) **Defined terms.** – The following words and phrases when used in this [*chapter*] shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Benefit corporation.” A business corporation:

- (1) which has elected to become subject to this [*chapter*]; and
- (2) the status of which as a benefit corporation has not been terminated under section 105.

“Benefit director.” Either:

[(1)] the director designated as the benefit director of a benefit corporation under section 302[; or

- (2) *a person with one or more of the powers, duties or rights of a benefit director to*

the extent provided in the bylaws under section 302].

“Benefit enforcement proceeding.” Any claim or action for:

- (1) failure of a benefit corporation to pursue or create general public benefit or a specific public benefit purpose set forth in its articles; or
- (2) violation of any obligation, duty or standard of conduct under this [chapter].

“Benefit officer.” The individual designated as the benefit officer of a benefit corporation under section 304.

“General public benefit.” A material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.

“Independent.” Having no material relationship with a benefit corporation or a subsidiary of the benefit corporation. Serving as benefit director or benefit officer does not make a person not independent. A material relationship between a person and a benefit corporation or any of its subsidiaries will be conclusively presumed to exist if any of the following apply:

- (1) The person is, or has been within the last three years, an employee other than a benefit officer of the benefit corporation or a subsidiary of the benefit corporation.
- (2) An immediate family member of the person is, or has been within the last three years, an executive officer other than a benefit officer of the benefit corporation or its subsidiary.
- (3) There is beneficial or record ownership of 5% or more of the outstanding shares of the benefit corporation by:

- (i) the person; or

- (ii) an association:

- (A) of which the person is a director, an officer or a manager; or

- (B) in which the person owns beneficially or of record 5% or more of the outstanding equity interests.

“Minimum status vote.”

(1) In the case of a business corporation, in addition to any other required approval or vote, the satisfaction of the following conditions:

- (i) The shareholders of every class or series shall be entitled to vote on the corporate action regardless of a limitation stated in the articles of incorporation or bylaws on the

voting rights of any class or series.

(ii) The corporate action must be approved by vote of the shareholders of each class or series entitled to cast at least two-thirds of the votes that all shareholders of the class or series are entitled to cast on the action.

[(2) In the case of a domestic entity other than a business corporation, in addition to any other required approval, vote or consent, the satisfaction of the following conditions:

(i) The holders of every class or series of equity interest in the entity that are entitled to receive a distribution of any kind from the entity shall be entitled to vote on or consent to the action regardless of any otherwise applicable limitation on the voting or consent rights of any class or series.

(ii) The action must be approved by vote or consent of the holders described in subparagraph (i) entitled to cast at least two-thirds of the votes or consents that all of those holders are entitled to cast on the action.]

“Specific public benefit.” Includes:

- (1) providing low-income or underserved individuals or communities with beneficial products or services;
- (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
- (3) preserving the environment;
- (4) improving human health;
- (5) promoting the arts, sciences or advancement of knowledge;
- (6) increasing the flow of capital to entities with a public benefit purpose; and
- (7) conferring any other particular benefit on society or the environment.

“Subsidiary.” In relation to a person, an association in which the person owns beneficially or of record 50% or more of the outstanding equity interests.

“Third-party standard.” A recognized standard for defining, reporting and assessing corporate social and environmental performance which is:

- (1) Comprehensive in that it assesses the effect of the business and its operations upon the interests listed in section 301(a)(1)(ii), (iii), (iv) and (v).

(2) Developed by an organization that is independent of the benefit corporation and satisfies the following requirements:

(i) Not more than one-third of the members of the governing body of the organization are representatives of any of the following:

(A) An association of businesses operating in a specific industry the performance of whose members is measured by the standard.

(B) Businesses from a specific industry or an association of businesses in that industry.

(C) Business whose performance is assessed against the standard.

(ii) The organization is not materially financed by an association or business described in subparagraph (i).

(3) Credible because the standard is developed by a person that both:

(i) Has access to necessary expertise to assess overall corporate social and environmental performance.

(ii) Uses a balanced multistakeholder approach, including a public comment period of at least 30 days to develop the standard.

(4) Transparent because the following information is publicly available:

(i) About the standard:

(A) The criteria considered when measuring the overall social and environmental performance of a business.

(B) The relative weightings of those criteria.

(ii) About the development and revision of the standard:

(A) The identity of the directors, officers, material owners and the governing body of the organization that developed and controls revisions to the standard.

(B) The process by which revisions to the standard and changes to the membership of the governing body are made.

(C) An accounting of the sources of financial support for the organization, with sufficient detail to disclose any relationships that could reasonably be considered to present a potential conflict of interest.

(b) **Computation of ownership.** – For purposes of the definitions of “independent” and “subsidiary” in subsection (a), a percentage of ownership in an entity shall be calculated as if all outstanding rights to acquire equity interests in the association had been exercised.

Comment:

“Benefit corporation.” The provisions of this chapter apply to a business corporation while it has the status of a benefit corporation because its articles contain a statement that it is a benefit corporation. If that statement is deleted under section 105(a), the corporation will cease to be a benefit corporation immediately upon the effectiveness of the deletion.

“Benefit director.” Paragraph (2) of this definition should be used in states that permit a corporation to provide that the functions of the board of directors will be discharged by persons other than directors. *See* section 302(f). *See also* section 401(a)(8) which requires a benefit corporation that has so varied its governance to describe the alternative arrangements in its annual benefit report.

“Benefit enforcement proceeding.” This definition not only describes the action that may be brought under section 305, but it also has the effect of excluding other actions against a benefit corporation and its directors and officers because section 305(a)(1) provides that “no person may bring an action or assert a claim against a benefit corporation or its directors or officers” with respect to violation of the provisions of this chapter.

The obligations that may be enforced through a benefit enforcement proceeding include the obligations of a benefit corporation under section 401(c) to post its benefit reports on its Internet website and to supply copies of its benefit report if it does not have an Internet website. In the case of a failure to provide a copy of a benefit report, a benefit enforcement proceeding to enforce that obligation may only be brought by the persons listed in section 305 and not by the person requesting the copy of the report.

“General public benefit.” By requiring that the impact of a business on society and the environment be looked at “as a whole,” the concept of general public benefit requires consideration of all of the effects of the business on society and the environment. What is involved in creating general public benefit is informed by section 301(a) which lists the specific interests that the directors of a benefit corporation are required to consider.

“Minimum status vote.” An amendment of the articles or a fundamental change that has the effect of changing the status of a corporation so that it either becomes a benefit corporation or ceases to be a benefit corporation must be approved by the minimum status vote. *See* sections 104 and 105. The purpose of requiring a two-thirds vote under this chapter is to ensure that there is broader shareholder support for an action. This definition will not be needed in states that require a supermajority vote for amendments of the articles or fundamental changes.

The second paragraph of the definition extends its policy to other forms of entities so that, for example, a merger of a limited liability company into a benefit corporation must be approved by the members of the limited liability company by at least a two-thirds vote. The second

paragraph should be omitted by those states that require a supermajority vote by the owners of an unincorporated entity to approve a fundamental change. See, e.g., Uniform Limited Liability Company Act (2006) § 1003, which requires a unanimous vote by the members of a limited liability company to approve a merger.

The two-thirds vote required by the definition is in addition to any other vote required in the case of any particular corporation or other form of association. If the articles of a corporation were to require, for example, an 80% supermajority vote to approve a merger, a 70% vote to approve a merger of the corporation into a benefit corporation would be sufficient to satisfy the requirement that the merger be approved by the minimum status vote but would not be sufficient for valid approval of the merger.

“Specific public benefit.” Every benefit corporation has the purpose under section 201(a) of creating general public benefit. A benefit corporation may also elect to pursue one or more specific public benefit purposes. Since the creation of specific public benefit is optional, paragraph (7) of this definition permits a benefit corporation to identify a specific public benefit that is different from those listed in paragraphs (1) through (6).

“Third-party standard.” The requirement in section 401 that a benefit corporation prepare an annual benefit report that assesses its performance in creating general public benefit against a third-party standard provides an important protection against the abuse of benefit corporation status. The performance of a regular business corporation is measured by the financial statements that the corporation prepares. But the performance of a benefit corporation in creating general or specific public benefit will not be readily apparent from those financial statements. The annual benefit report is intended to permit an evaluation of that performance so that the shareholders can judge how the directors have discharged their responsibility to manage the corporation and thus whether they should be retained in office. The annual benefit report is also intended to reduce “greenwashing” (the phenomenon of businesses seeking the cachet of being more environmentally and socially responsible than they actually are) by giving consumers and the general public a means of judging whether a business is living up to its claimed status as a benefit corporation.

§ 103. Formation of benefit corporations.

A benefit corporation must be formed in accordance with [*cite incorporation provisions of the business corporation law*], but its articles must also state that it is a benefit corporation.

Comment:

This section provides for how a corporation that is being newly formed may elect to be a benefit corporation. Existing corporations may become benefit corporations in the manner provided in section 104.

This chapter only applies to domestic business corporations. A foreign business corporation that has a status in its home jurisdiction similar to the status of a benefit corporation

under this chapter is not subject to this chapter and has the status simply of a foreign business corporation for purposes of the state's business corporation law.

The term "benefit corporation" used in this section is defined in section 102.

§ 104. Election of status.

(a) **Amendment.** – An existing business corporation may become a benefit corporation under this chapter by amending its articles so that they contain, in addition to the requirements of [cite section of the business corporation law on the required contents of articles of incorporation], a statement that the corporation is a benefit corporation. In order to be effective, the amendment must be adopted by the minimum status vote.

(b) **Fundamental transactions.** –

(1) This subsection applies if all of the following subparagraphs apply:

(i) An association that is not a benefit corporation is:

(A) a party to a merger, consolidation or division; or

(B) the exchanging association in a share exchange.

(ii) The surviving, new or any resulting association in the merger, consolidation, division or share exchange is to be a benefit corporation.

(2) In order to be effective, a plan of merger, consolidation, division or share exchange subject to this subsection must be adopted by the minimum status vote.

Comment:

This section provides the procedures for an existing corporation to become a benefit corporation. A corporation that is being newly formed may become a benefit corporation in the manner provided in section 103. Subsection (a) applies to a business corporation that is directly electing to be a benefit corporation by amending its articles of incorporation. Subsection (b) applies when a corporation is becoming a benefit corporation indirectly in the context of a fundamental transaction. In both cases, the change to benefit corporation status must be approved by at least the minimum status vote.

Subsection (b) also applies to an entity that is not a corporation when the entity is a party to a transaction that will result in a benefit corporation. In those situations, a supermajority vote of the owners of the entity is required by subsection (b).

See section 201(d) with respect to changing the identification of a specific public benefit that it is the purpose of a benefit corporation to pursue.

The following terms used in this section are defined in section 102:

“benefit corporation”

“minimum status vote”

§ 105. Termination of status.

(a) **Amendment.** – A benefit corporation may terminate its status as such and cease to be subject to this chapter by amending its articles to delete the provision required by section 104 to be stated in the articles of a benefit corporation. In order to be effective, the amendment must be adopted by the minimum status vote.

(b) **Fundamental transactions.** – If a plan would have the effect of terminating the status of a business corporation as a benefit corporation, in order to be effective, the plan must be adopted by the minimum status vote. Any sale, lease, exchange or other disposition of all or substantially all of the assets of a benefit corporation, unless the transaction is in the usual and regular course of business, shall not be effective unless the transaction is approved by at least the minimum status vote.

Comment:

This section provides the procedures for a benefit corporation to terminate voluntarily its status as a benefit corporation. As with an election of benefit corporation status under section 104, the termination may be accomplished either directly by an amendment of the articles or indirectly through a fundamental transaction.

The last sentence of subsection (b) provides a special rule for a sale of all or substantially all of the assets of a benefit corporation. Such a transaction will not result in a termination of the status of the corporation as a benefit corporation, but will have effectively the same result since it will terminate the operations of the business. Thus it was considered appropriate to require approval of a sale of assets by the minimum status vote. Whether a sale of assets is in the usual and regular course will be determined under the same standards as apply to that question under the state’s business corporation law. *See, e.g.*, Model Business Corporation Act §§ 12.01 and 12.02.

The following terms used in this section are defined in section 102:

“benefit corporation”

“minimum status vote”

Subchapter 2 Corporate Purposes

Section

201. Corporate purposes.

§ 201. Corporate purposes.

(a) **General public benefit purpose.** – A benefit corporation shall have a purpose of creating general public benefit. This purpose is in addition to its purpose under [*cite section of the business corporation law on the purpose of business corporations*].

(b) **Optional specific public benefit purpose.** – The articles of a benefit corporation may identify one or more specific public benefits that it is the purpose of the benefit corporation to create in addition to its purposes under [*cite section of the business corporation law on the purpose of business corporations*] and subsection (a). The identification of a specific public benefit under this subsection does not limit the obligation of a benefit corporation under subsection (a).

(c) **Effect of purposes.** – The creation of general public benefit and specific public benefit under subsections (a) and (b) is in the best interests of the benefit corporation.

(d) **Amendment.** – A benefit corporation may amend its articles to add, amend or delete the identification of a specific public benefit that it is the purpose of the benefit corporation to create. In order to be effective, the amendment must be adopted by the minimum status vote.

(e) **Professional corporations.** – A professional corporation that is a benefit corporation does not violate [*cite section of professional corporation law, if any, that restricts the business in which a professional corporation may engage*] by having the purpose to create general public benefit or a specific public benefit.

Comment:

Every benefit corporation has the corporate purpose of creating general public benefit. A benefit corporation may also elect to pursue specific public benefits under subsection (b).

Subsection (c) confirms that pursuing general and specific public benefit is in the best interests of the benefit corporation. Because the basic duty of a director is to act in a manner that the director reasonably believes to be in the best interests of the corporation, decisions by the board of directors that promote the creation of general or specific public benefit will satisfy the requirement to act in the best interests of the corporation. If an ordinary business corporation includes in its articles of incorporation a statement of a specific purpose, it is by definition in the best interests of the corporation for the directors to pursue that purpose. Thus the rule in subsection (c) would be the case in any event, but has been stated expressly in subsection (c) because of the importance to the concept of a benefit corporation of the creation of public benefit.

Some professional corporation statutes provide that a professional corporation may not engage in any business other than rendering the professional service for which it was specifically

incorporated. Subsection (e) makes clear that such a limitation will not interfere with a professional corporation electing to be a benefit corporation. In such a case, the professional corporation (such as a law firm, accounting firm, or medical practice) will be limited to providing the professional services for which it was incorporated, but it will be able to provide those services in a manner that creates general public benefit or a specific public benefit (for example, a medical practice that focuses on providing care for low-income individuals).

The following terms used in this section are defined in section 102:

“benefit corporation”
“general public benefit”
“minimum status vote”
“specific public benefit”

Subchapter 3 Accountability

Section

- 301. Standard of conduct for directors.
- 302. Benefit director.
- 303. Standard of conduct for officers.
- 304. Benefit officer.
- 305. Right of action.

§ 301. Standard of conduct for directors.

(a) **Consideration of interests.** – In discharging the duties of their respective positions and in considering the best interests of the benefit corporation, the board of directors, committees of the board and individual directors of a benefit corporation:

- (1) shall consider the effects of any action or inaction upon:
 - (i) the shareholders of the benefit corporation;
 - (ii) the employees and work force of the benefit corporation, its subsidiaries and its suppliers;
 - (iii) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation;
 - (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries or its suppliers are located;
 - (v) the local and global environment;

(vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and

(vii) the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose; and

(2) may consider:

[(i) *cite constituencies provision of the business corporation law if it refers to constituencies not listed above; and*

(ii)] other pertinent factors or the interests of any other group that they deem appropriate; but

(3) need not give priority to the interests of a particular person or group referred to in paragraph (1) or (2) over the interests of any other person or group unless the benefit corporation has stated in its articles its intention to give priority to certain interests related to its accomplishment of its general public benefit purpose or of a specific public benefit purpose identified in its articles.

(b) Coordination with other provisions of law. –The consideration of interests and factors in the manner required by subsection (a)[:

(1)] does not constitute a violation of [*cite provision of the business corporation law on the duties of directors generally*] [; and

(2) *is in addition to the ability of directors to consider interests and factors as provided in [cite constituencies provision of the business corporation law]*].

(c) Exoneration from personal liability generally. – A director is not personally liable for monetary damages for:

(1) any action taken as a director if the director performed the duties of office in compliance with [*cite provision of the business corporation law on the duties of directors generally*]; or

(2) failure of the benefit corporation to pursue or create general public benefit or specific public benefit.

(d) Limitation on standing. – A director does not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary.

Comment:

This section is at the heart of what it means to be a benefit corporation. By requiring the consideration of interests of constituencies other than the shareholders, the section rejects the holdings in *Dodge v. Ford*, 170 N.W. 668 (Mich. 1919), and *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010), that directors must maximize the financial value of a corporation. In a state that has adopted a “constituency statute,” directors are authorized to consider the interests of corporate constituencies other than the shareholders, but the directors are not *required* to do so. Subsection (a) makes it mandatory for the directors of a benefit corporation to consider the interests and factors that they would otherwise simply be permitted to consider in their discretion under the typical constituency statute.

Subsection (d) negates any duty of directors to non-shareholder constituents. *But see* section 305(b) which permits a benefit corporation to provide in its articles that an identified category of persons may bring a benefit enforcement proceeding. If a benefit corporation were to do so, the identified non-shareholder constituents would be able to allege a breach of duty by the directors under this chapter for failing to pursue or create general or specific public benefit, but subsection (d) would prevent those constituents from alleging a breach of duty to them.

The following terms used in this section are defined in section 102:

“benefit corporation”
“benefit enforcement proceeding”
“general public benefit”
“specific public benefit”
“subsidiary”

§ 302. Benefit director.

(a) General rule. – The board of directors of a benefit corporation shall include one director, who:

- (1) shall be designated the benefit director; and
- (2) shall have, in addition to the powers, duties, rights and immunities of the other directors of the benefit corporation, the powers, duties, rights and immunities provided in this subchapter.

(b) Election, removal and qualifications. – The benefit director shall be elected, and may be removed, in the manner provided by [*cite provisions of the business corporation law on the election and removal of directors generally*], and shall be an individual who is independent. The benefit director may serve as the benefit officer at the same time as serving as the benefit director. The articles or bylaws of a benefit corporation may prescribe additional qualifications of the benefit director not inconsistent with this subsection.

(c) Annual compliance statement. – The benefit director shall prepare, and the benefit

corporation shall include in the annual benefit report to shareholders required by section 401, the opinion of the benefit director on all of the following:

(1) Whether the benefit corporation acted in accordance with its general public benefit purpose and any specific public benefit purpose in all material respects during the period covered by the report.

(2) Whether the directors and officers complied with sections 301(a) and 303(a), respectively.

(3) If, in the opinion of the benefit director, the benefit corporation or its directors or officers failed to comply with paragraph (2), a description of the ways in which the benefit corporation or its directors or officers failed to comply.

(d) Status of actions. – The act or inaction of an individual in the capacity of a benefit director shall constitute for all purposes an act or inaction of that individual in the capacity of a director of the benefit corporation.

(e) Exoneration from personal liability. – Regardless of whether the bylaws of a benefit corporation include a provision eliminating or limiting the personal liability of directors authorized by [*cite section of the business corporation law permitting exoneration of directors*], a benefit director shall not be personally liable for an act or omission in the capacity of a benefit director unless the act or omission constitutes self-dealing, willful misconduct or a knowing violation of law.

[(f) Alternative governance arrangements. –

(1) The bylaws of a benefit corporation must provide that the persons or shareholders who perform the duties of the board of directors include a person with the powers, duties, rights and immunities of a benefit director if either of the following applies:

*(i) The bylaws of a benefit corporation provide that the powers and duties conferred or imposed upon the board of directors shall be exercised or performed by a person other than the directors under [*cite section, if any, of the business corporation law permitting alternative governance arrangements*].*

(ii) The bylaws of a statutory close corporation that is a benefit corporation provide that the business and affairs of the corporation shall be managed by or under the direction of the shareholders.

(2) A person that exercises one or more of the powers, duties or rights of a benefit director under this subsection:

(i) does not need to be independent of the benefit corporation;

(ii) shall have the immunities of a benefit director;

(iii) may share the powers, duties and rights of a benefit director with one or more other persons; and

(iv) shall not be subject to the procedures for election or removal of directors in [cite applicable provisions of the business corporation law] unless:

(A) the person is also a director of the benefit corporation; or

(B) the bylaws make those procedures applicable.]

Comment:

The statement of the benefit director required by subsection (c) is an important part of the transparency required under this chapter. The perspective of the benefit director on whether the corporation has been successful in pursuing its general and any named specific public benefit purpose will be an important source of information for the shareholders as to whether the directors have adequately discharged their stewardship of the benefit corporation and its resources.

Subsection (d) makes clear that the actions of a benefit director are actions of a director of the benefit corporation and are subject to the same standards as actions of directors generally.

The wording of subsection (e) should be conformed to the provision of the state's business corporation law that permits the shareholders to adopt a provision of the articles or bylaws exonerating directors from liability for breach of duty. But unlike existing exoneration provisions, subsection (e) does not require the benefit corporation to adopt an implementing provision in the articles or bylaws. Instead the liability shield provided by subsection (e) automatically applies to all benefit directors.

Subsection (f) should be adopted in those states that authorize a business corporation to vary the usual functions of the board of directors, either in the general business corporation law or, more typically, a statutory close corporation statute. If a benefit corporation chooses to vary the usual governance paradigm under one of those sections, subsection (f) explains how this section will apply to the corporation. See section 401(a)(8) which requires a benefit corporation that has so varied its governance to describe the alternative arrangements in its annual benefit report.

The following terms used in this section are defined in section 102:

“benefit corporation”

“benefit director”

“benefit enforcement proceeding”

“benefit officer”

“general public benefit”

“independent”

“specific public benefit”

§ 303. Standard of conduct for officers.

(a) General rule. – Each officer of a benefit corporation shall consider the interests and factors described in section 301 in the manner provided in that subsection if:

- (1) the officer has discretion to act with respect to a matter; and
- (2) it reasonably appears to the officer that the matter may have a material effect on the creation by the benefit corporation of general public benefit or a specific public benefit identified in the articles of the benefit corporation.

(b) Coordination with other provisions of law. – The consideration of interests and factors in the manner described in subsection (a) shall not constitute a violation of [*cite provision of the business corporation law on the duties of officers*].

(c) Exoneration from personal liability. – An officer is not personally liable for monetary damages for:

- (1) an action or omission as an officer if the officer performed the duties of the position in compliance with [*cite provision of the business corporation law on the duties of officers*] and this section; or
- (2) failure of the benefit corporation to pursue or create general public benefit or specific public benefit.

(d) Limitation on standing. – An officer does not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary.

Comment:

As an agent of the corporation, an officer is generally required to follow the instructions of his or her principal. But in those instances where an officer has discretion to act with a respect to a matter, subsection (a) requires the officer to consider the interests of the benefit corporation’s constituencies in the same manner as required of the directors by section 301.

This section applies to all of the officers of the benefit corporation and is not limited just to the benefit officer, if any, of the benefit corporation.

See the Comment to section 301(d) with respect to subsection (d).

The following terms used in this section are defined in section 102:

“benefit corporation”
“benefit enforcement proceeding”
“benefit officer”
“general public benefit”
“specific public benefit”

§ 304. Benefit officer.

(a) **Designation.** – A benefit corporation may have an officer designated the benefit officer.

(b) **Functions.** – A benefit officer shall have:

(1) the powers and duties relating to the purpose of the corporation to create general public benefit or specific public benefit provided:

(i) by the bylaws; or

(ii) absent controlling provisions in the bylaws, by resolutions or orders of the board of directors.

(2) the duty to prepare the benefit report required by section 401.

Comment:

The designation of a benefit officer is optional. But if a benefit officer is designated, one of the duties of that officer will be to prepare the annual benefit report required by section 401.

The following terms used in this section are defined in section 102:

“benefit corporation”
“benefit officer”
“general public benefit”
“specific public benefit”

§ 305. Right of action.

(a) **Limitations.** –

(1) Except in a benefit enforcement proceeding, no person may bring an action or assert a claim against a benefit corporation or its directors or officers with respect to:

(i) failure to pursue or create general public benefit or a specific public benefit set forth in its articles; or

(ii) violation of a duty or standard of conduct under this [chapter].

(2) A benefit corporation shall not be liable for monetary damages under this [chapter] for any failure of the benefit corporation to pursue or create general public benefit or a specific public benefit.

(b) Standing. – A benefit enforcement proceeding may be commenced or maintained only:

(1) directly by the benefit corporation; or

(2) derivatively by:

(i) a shareholder;

(ii) a director;

(iii) a person or group of persons that owns beneficially or of record 5% or more of the equity interests in an entity of which the benefit corporation is a subsidiary; or

(iv) other persons as specified in the articles or bylaws of the benefit corporation.

Comment:

Standing in an action against the directors or officers of a business corporation that is not a benefit corporation for breach of duty is limited in most states just to the corporation or shareholders bringing a derivative suit. This section provides a similar limitation on standing in actions to enforce this chapter, except that the grant of standing to a director or 5% shareholder of a parent association is new.

This section only applies to actions or claims relating to the duties of directors and officers under this chapter, and the general and specific public benefit purposes of a benefit corporation. Lawsuits for other breaches of duty, or for breach of contract by directors, officers, or the benefit corporation are not subject to this section.

The following terms used in this section are defined in section 102:

“benefit corporation”

“benefit enforcement proceeding”

“general public benefit”

“specific public benefit”

“subsidiary”

Subchapter 4 Transparency

Section

401. Annual benefit report.

§ 401. Annual benefit report.

(a) **Contents.** – A benefit corporation shall prepare an annual benefit report including all of the following:

(1) A narrative description of:

(i) The ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created.

(ii) Both:

(A) the ways in which the benefit corporation pursued a specific public benefit that the articles state it is the purpose of the benefit corporation to create; and

(B) the extent to which that specific public benefit was created.

(iii) Any circumstances that have hindered the creation by the benefit corporation of general public benefit or specific public benefit.

(iv) The process and rationale for selecting or changing the third-party standard used to prepare the benefit report.

(2) An assessment of the overall social and environmental performance of the benefit corporation against a third-party standard:

(i) applied consistently with any application of that standard in prior benefit reports; or

(ii) accompanied by an explanation of the reasons for any inconsistent application.

(3) The name of the benefit director and the benefit officer, if any, and the address to which correspondence to each of them may be directed.

(4) The compensation paid by the benefit corporation during the year to each director in the capacity of a director.

(5) The name of each person that owns 5% or more of the outstanding shares of the benefit corporation either:

(i) beneficially, to the extent known to the benefit corporation without independent investigation; or

(ii) of record.

(6) The statement of the benefit director described in section 302(c).

(7) A statement of any connection between the organization that established the third-party standard, or its directors, officers or material owners, and the benefit corporation or its directors, officers or material shareholders, including any financial or governance relationship which might materially affect the credibility of the use of the third-party standard.

[(8) If the benefit corporation has dispensed with, or restricted the discretion or powers of, the board of directors, a description of:

(i) the persons that exercise the powers, duties and rights and who have the immunities of the board of directors; and

(ii) the benefit director, as required by section 302(e).]

(b) Timing of report. – A benefit corporation shall annually send a benefit report to each shareholder:

(1) within 120 days following the end of the fiscal year of the benefit corporation;
or

(2) at the same time that the benefit corporation delivers any other annual report to its shareholders.

(c) Internet website posting. – A benefit corporation shall post all of its benefit reports on the public portion of its Internet website, if any; but the compensation paid to directors and financial or proprietary information included in the benefit reports may be omitted from the benefit reports as posted.

(d) Availability of copies. – If a benefit corporation does not have an Internet website, the benefit corporation shall provide a copy of its most recent benefit report, without charge, to any person that requests a copy, but the compensation paid to directors and financial or proprietary information included in the benefit report may be omitted from the copy of the benefit report provided.

(e) Filing of report. –

(1) Concurrently with the delivery of the benefit report to shareholders under subsection (b), the benefit corporation shall deliver a copy of the benefit report to the department for filing, but the compensation paid to directors and financial or proprietary information

included in the benefit report may be omitted from the benefit report as delivered to the department.

(2) The [Secretary of State] shall charge a fee of \$70 for filing a benefit report.

Comment:

A benefit corporation may change from year to year the standard it uses under subsection (a)(2) for assessing its performance. But if a benefit corporation uses the same standard for assessing its performance in more than one year, the standard must either be applied consistently or the benefit corporation must provide an explanation of the reasons for any inconsistent use of the standard.

Subsection (a)(5) requires the disclosure of all record shareholders that own 5% or more of the benefit corporation. The benefit corporation must also disclose in its annual benefit report any beneficial owners of 5% or more that are known to the benefit corporation, but it does not have an obligation to inquire as to the existence of any such owners.

The following terms used in this section are defined in section 102:

“benefit corporation”

“benefit director”

“general public benefit”

“specific public benefit”

“third-party standard”

**AMENDMENTS TO THE
PENNSYLVANIA CONSOLIDATED STATUTES
WITH
OFFICIAL SOURCE NOTES AND
COMMITTEE COMMENTS**

**ADOPTING
PROVISIONS RELATING TO THE INCORPORATION
AND GOVERNANCE OF BENEFIT CORPORATIONS
AS CHAPTER 33 OF TITLE 15**

**PREPARED BY THE
TITLE 15 / BUSINESS ASSOCIATIONS COMMITTEE
OF THE
SECTION ON BUSINESS LAW
OF THE
PENNSYLVANIA BAR ASSOCIATION**

The ideas and conclusions set forth in this draft, including the proposed statutory language and Committee Comments, have not been passed upon by the Pennsylvania Bar Association and do not necessarily reflect its views or policies.

**PENNSYLVANIA BAR ASSOCIATION
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CHAPTER 33

Benefit Corporations

Subchapter

- A. Preliminary Provisions
- B. Corporate Purposes
- C. Accountability
- D. Transparency

Subchapter A

Preliminary Provisions

Section

- 3301. Application and effect of chapter.
- 3302. Definitions.
- 3303. Formation of benefit corporations.
- 3304. Election of an existing business corporation to become a benefit corporation.
- 3305. Termination of benefit corporation status.

§ 3301. Application and effect of chapter.

(a) General rule. – This chapter shall be applicable to all benefit corporations.

(b) Application of business corporation law generally. – The existence of a provision of this chapter shall not of itself create any implication that a contrary or different rule of law is or would be applicable to a business corporation that is not a benefit corporation. This chapter shall not affect any statute or rule of law that is or would be applicable to a business corporation that is not a benefit corporation.

(c) Laws applicable to benefit corporations. – Except as otherwise provided in this chapter, this subpart shall be generally applicable to all benefit corporations. The specific provisions of this chapter shall control over the general provisions of this subpart. A benefit corporation may be simultaneously subject to this chapter and one or more other chapters of this article.

(d) Organic records may not be inconsistent. – A provision of the articles or bylaws of a benefit corporation may not relax, be inconsistent with or supersede any provision of this chapter.

Committee Comment:

This chapter authorizes the organization of a form of business corporation that offers

entrepreneurs and investors the option to build, and invest in, businesses that operate in a socially and environmentally responsible manner. Enforcement of those responsibilities comes not from governmental oversight, but rather from new provisions on transparency and accountability included in this chapter.

The Committee Comments to Chapter 33 are intended to form part of the legislative history of Chapter 33 and to be citable as such under 1 Pa.C.S. § 1939.

Subsection (d) makes clear that, if a corporation elects to be subject to this chapter, it will be subject to all of the provisions of the chapter and will not be able to vary their application to the corporation.

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“articles”
“business corporation”
“bylaws”
“relax”

The term “benefit corporation” used in this section is defined in 15 Pa.C.S. § 3302.

§ 3302. Definitions.

(a) Defined terms. – As used in this chapter:

“Benefit corporation” means a business corporation that has elected to become subject to this chapter and whose status as a benefit corporation has not been terminated as provided in this chapter.

“Benefit director” means the director designated as the benefit director of a benefit corporation as provided in section 3322 (relating to benefit director).

“Benefit enforcement proceeding” means a claim or action brought directly by a benefit corporation, or derivatively on behalf of a benefit corporation, against a director or officer for:

- (1) failure to pursue the general public benefit purpose of the benefit corporation or any specific public benefit purpose set forth in its articles; or
- (2) violation of a duty or standard of conduct under this chapter.

“Benefit officer” means the officer of a benefit corporation, if any, designated as the

benefit officer as provided in section 3324 (relating to benefit officer).

“General public benefit” means a material positive impact on society and the environment by the operations of a benefit corporation taken as a whole, as measured by a third-party standard, through activities that promote some combination of specific public benefits.

“Independent” means that a person has no material relationship with a benefit corporation or any of its subsidiaries (other than the relationship of serving as the benefit director or benefit officer), either directly or as a shareholder, partner, member or other owner or a director, officer or other manager of an association that has a material relationship with the benefit corporation or any of its subsidiaries. A material relationship between an individual and a benefit corporation or any of its subsidiaries will be conclusively presumed to exist if:

- (1) the person is, or has been within the last three years, an employee of the benefit corporation or any of its subsidiaries, other than as a benefit officer;
- (2) an immediate family member of the person is, or has been within the last three years, an executive officer, other than a benefit officer, of the benefit corporation or any of its subsidiaries; or
- (3) the person, or an association of which the person is a director, officer or other manager or in which the person owns beneficially or of record 5% or more of the outstanding equity interests, owns beneficially or of record 5% or more of the outstanding shares of the benefit corporation.

“Minimum status vote” means that, in addition to any other approval or vote required by this subpart or a bylaw adopted by the shareholders:

- (1) The holders of shares of every class or series shall be entitled to vote on the corporate action regardless of any limitation stated in the articles of incorporation or bylaws on the voting rights of any class or series.
- (2) The corporate action must be approved by vote of the shareholders of each class or series entitled to cast at least two-thirds of the votes that all shareholders of the class or series are entitled to cast thereon.

“Specific public benefit” includes:

- (1) providing low-income or underserved individuals or communities with beneficial products or services;

- (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;
- (3) preserving the environment;
- (4) improving human health;
- (5) promoting the arts, sciences or advancement of knowledge;
- (6) increasing the flow of capital to entities with a public benefit purpose; and
- (7) the accomplishment of any other particular benefit for society or the environment.

“Subsidiary” of a person means an association in which the person owns beneficially or of record 50% or more of the outstanding equity interests.

“Third-party standard” means a recognized standard for defining, reporting and assessing corporate social and environmental performance that is:

- (1) developed by a person that is independent of the benefit corporation; and
- (2) transparent because the following information about the standard is publicly available:
 - (i) the factors considered when measuring the performance of a business;
 - (ii) the relative weightings of those factors; and
 - (iii) the identity of the persons who developed and control changes to the standard and the process by which those changes are made.

(b) Computation of ownership. – For purposes of the definitions of “independent” and “subsidiary” in subsection (a), a percentage of ownership in an association shall be calculated as if all outstanding rights to acquire equity interests in the association had been exercised.

Committee Comment:

“Benefit corporation.” The status of a benefit corporation as such may be terminated either voluntarily under 15 Pa.C.S. § 3305 (relating to termination of benefit corporation status) or involuntarily under 15 Pa.C.S. § 3331(e) (relating to annual benefit report).

“Benefit enforcement proceeding.” This definition not only describes the action that may be brought under 15 Pa.C.S. § 3325, but it also has the effect of excluding other actions against directors and officers of a benefit corporation because 15 Pa.C.S. § 3325(a) provides that “No person may bring an action or assert a claim against a benefit corporation or its directors or officers with respect to the duties of directors and officers under this chapter and the general and any specific public benefit purpose of the benefit corporation except in a benefit enforcement proceeding.”

“General public benefit.” The determination of whether a benefit corporation has created general public benefit looks at the operations of the business taken as a whole.

“Minimum status vote.” An amendment of the articles or a fundamental change that has the effect of changing the status of a corporation so that it either becomes a benefit corporation or ceases to be a benefit corporation must be approved by the minimum status vote. See 15 Pa.C.S. §§ 3304 and 3305. This definition is patterned after the definition of “minimum vote” in 15 Pa.C.S. § 2302. The purpose of requiring a two-thirds vote under this chapter and Chapter 23 is to ensure that there is broader shareholder support for an action than the usual rule in Title 15 that action by the shareholders requires approval of a majority of the votes cast.

“Specific public benefit.” Every benefit corporation has the purpose under 15 Pa.C.S. § 3311(a) of creating general public benefit. A benefit corporation may also elect to pursue one or more specific public benefit purposes. Since the creation of specific public benefit is optional, paragraph (7) of this definition permits a benefit corporation to identify a specific public benefit that is different from those listed in paragraphs (1) through (6).

§ 3303. Formation of benefit corporations.

A benefit corporation shall be formed in accordance with Article B (relating to domestic business corporations generally) except that its articles shall also state that it is a benefit corporation.

Committee Comment:

This section provides for how a corporation that is being newly formed may elect to be a benefit corporation. Existing corporations may become benefit corporations in the manner provided in 15 Pa.C.S. § 3304.

This chapter only applies to domestic business corporations. A foreign business corporation that has a status in its home jurisdiction similar to the status of a benefit

corporation under this chapter is not subject to this chapter and has the status simply of a foreign business corporation for purposes of 15 Pa.C.S. Subpart IIB.

The term “articles” used in this section is defined in 15 Pa.C.S. § 1103.

The term “benefit corporation” used in this section is defined in 15 Pa.C.S. § 3302.

§ 3304. Election of an existing business corporation to become a benefit corporation.

(a) Amendment. – A business corporation may become a benefit corporation under this chapter by amending its articles so that they contain, in addition to the requirements of section 1911(b) (relating to exceptions), a statement that the corporation is a benefit corporation. The amendment shall not be effective unless it is adopted by at least the minimum status vote.

(b) Fundamental transactions. – If a corporation that is not a benefit corporation is a party to a merger, consolidation or division or is the exchanging corporation in a share exchange, and the surviving, new or any resulting corporation in the merger, consolidation, division or share exchange is to be a benefit corporation, then the plan of merger, consolidation, division or share exchange shall not be effective unless it is adopted by the corporation by at least the minimum status vote.

Committee Comment:

This section provides the procedures for an existing corporation to become a benefit corporation. A corporation that is being newly formed may become a benefit corporations in the manner provided in 15 Pa.C.S. § 3303.

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“articles”

“plan”

The following terms used in this section are defined in 15 Pa.C.S. § 3302:

“benefit corporation”

“minimum status vote”

§ 3305. Termination of benefit corporation status.

(a) Amendment. – A benefit corporation may terminate its status as such and cease to be subject to this chapter by amending its articles to delete the provision required by section 3304 (relating to formation of benefit corporations) to be stated in the articles of a benefit corporation. The amendment shall not be effective unless it is adopted by at least the minimum status vote.

(b) Fundamental transactions. – If a plan would have the effect of terminating the status of a business corporation as a benefit corporation, the plan shall not be effective unless it is adopted by at least the minimum status vote.

(c) Cross reference. – See section 3331(e) (relating to annual benefit report).

Committee Comment:

This section provides the procedures for a benefit corporation to terminate voluntarily its status as a benefit corporation.

The cross reference in subsection (c) to 15 Pa.C.S. § 3331(e) is a reminder that the status of a corporation as a benefit corporation may also be terminated involuntarily if it fails to file an annual benefit report

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“articles”

“plan”

The following terms used in this section are defined in 15 Pa.C.S. § 3302:

“benefit corporation”

“minimum status vote”

Subchapter B Corporate Purposes

Section

3311. Corporate purposes.

§ 3311. Corporate purposes.

(a) General public benefit purpose. – Every benefit corporation shall have the purpose of creating general public benefit. This purpose is in addition to, and may be a limitation on, its purpose under section 1301 (relating to purposes) and any specific

purpose set forth in its articles under subsection (b).

(b) Optional specific public benefit purpose. – The articles of a benefit corporation may identify one or more specific public benefits that it is the purpose of the benefit corporation to create in addition to its purposes under section 1301 (relating to purposes) and subsection (a). The identification of a specific public benefit under this subsection does not limit the obligation of a benefit corporation to create general public benefit.

(c) Effect of purposes. – The creation of general and specific public benefit as provided in subsections (a) and (b) is in the best interests of the benefit corporation.

(d) Amendment. – A benefit corporation may amend its articles to add, amend or delete the identification of a specific public benefit that it is the purpose of the benefit corporation to create. The amendment shall not be effective unless it is adopted by at least the minimum status vote.

Committee Comment:

Every benefit corporation has the corporate purpose of creating general public benefit. A benefit corporation may also elect to pursue specific public benefits under subsection (b).

Subsection (c) confirms that pursuing general and specific public benefit is in the best interests of the benefit corporation. Because the basic duty of a director is to act in a manner that the director reasonably believes to be in the best interests of the corporation, decisions by the board of directors that promote the creation of general or specific public benefit will satisfy the requirement to act in the best interests of the corporation. If an ordinary business corporation includes in its articles of incorporation a statement of a specific purpose, it is by definition in the best interests of the corporation for the directors to pursue that purpose. Thus the rule in subsection (c) would be the case in any event, but the Committee concluded it would be useful to state expressly the rule in subsection (c) because of the importance to the concept of a benefit corporation of the creation of public benefit.

The term “articles” used in this section is defined in 15 Pa.C.S. § 1103.

The following terms used in this section are defined in 15 Pa.C.S. § 3302:

“benefit corporation”

“general public benefit”

“minimum status vote”

“specific public benefit”

Subchapter C Accountability

Section

- 3321. Standard of conduct for directors.
- 3322. Benefit director.
- 3323. Standard of conduct for officers.
- 3324. Benefit officer.
- 3325. Right of action.

§ 3321. Standard of conduct for directors.

(a) Required considerations. – Without regard to whether the benefit corporation is subject to section 1715 (relating to exercise of powers generally) or 1716 (relating to alternative standard), in discharging the duties of their respective positions, the board of directors, committees of the board and individual directors of a benefit corporation, in considering the best interests of the benefit corporation,

(1) shall consider the effects of any action upon:

- (i) the shareholders of the benefit corporation;
- (ii) the employees and workforce of the benefit corporation and its subsidiaries and suppliers;
- (iii) the interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit corporation;
- (iv) community and societal considerations, including those of any community in which offices or facilities of the benefit corporation or its subsidiaries or suppliers are located;
- (v) the local and global environment; and
- (vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation;

(2) may consider:

(i) the resources, intent and conduct (past, stated and potential) of any person seeking to acquire control of the corporation; and

(ii) any other pertinent factors or the interests of any other group that they deem appropriate; and

(3) shall not be required to give priority to the interests of any particular person or group referred to in paragraphs (1) and (2) over the interests of any other person or group unless the benefit corporation has stated its intention to give priority to interests related to a specific public benefit purpose identified in its articles.

(b) Coordination with other provisions of law. –The consideration of interests and factors in the manner required by subsection (a):

(1) shall not constitute a violation of section 1712 (relating to standard of care and justifiable reliance); and

(2) is in addition to the ability of directors to consider interests and factors as provided in section 1715 (relating to exercise of powers generally) or 1716 (relating to alternative standard).

(c) Exoneration from personal liability. – A director is not personally liable, as such, for monetary damages for any action taken as a director if the director performed the duties of his or her office in compliance with section 1712 (relating to standard of care and justifiable reliance) and this section.

Committee Comment:

Subsection (a) makes mandatory the consideration of certain interests and factors that would otherwise be permissive under 15 Pa.C.S. §§ 1715 and 1716. Subsection (b) makes clear that the provisions of 15 Pa.C.S. § 1715(b) – (e) apply to a benefit corporation. Those provisions, among other things, make inapplicable to Pennsylvania corporations the holdings in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), and *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

The term “act” used in this section is defined in 15 Pa.C.S. § 103 to include failure to act.

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“board of directors”

“director”

“shareholders”

The following terms used in this section are defined in 15 Pa.C.S. § 3302:

“benefit corporation”
“benefit enforcement proceeding”
“general public benefit”
“specific public benefit”
“subsidiary”

§ 3322. Benefit director.

(a) General rule. – The board of directors of a benefit corporation shall include one director who shall be designated the “benefit director” and shall have, in addition to all of the powers, duties, rights and immunities of the other directors of the benefit corporation, the powers, duties, rights and immunities provided in this subchapter.

(b) Election, removal and qualifications. – The benefit director shall be elected, and may be removed, in the manner provided by Subchapter C of Chapter 17 (relating to directors and officers), and shall be an individual who is independent. The benefit director may serve as the benefit officer at the same time as serving as the benefit director. The articles or bylaws of a benefit corporation may prescribe additional qualifications of the benefit director not inconsistent with this subsection.

(c) Annual compliance statement. – The benefit director shall prepare, and the benefit corporation shall include in the annual benefit report to shareholders required by section 3331 (relating to annual benefit report), a statement whether, in the opinion of the benefit director, the benefit corporation acted in accordance with its general, and any specific, public benefit purpose in all material respects during the period covered by the report and whether the directors and officers complied with sections 3321(a) (relating to standard of conduct for directors) and 3323(a) (relating to standard of conduct for officers), respectively. If in the opinion of the benefit director the benefit corporation or its directors or officers failed so to act, then the statement of the benefit director shall include a description of the ways in which the benefit corporation or its directors or officers failed so to act.

(d) Status of actions. – The acts of an individual in the capacity of a benefit director shall constitute for all purposes acts of that individual in the capacity of a director of the benefit corporation.

(e) Alternative governance arrangements. – If the bylaws of a benefit corporation provide that the powers and duties conferred or imposed upon the board of directors shall be exercised or performed by a person or persons other than the directors pursuant to

section 1721(a) (relating to board of directors) or the bylaws of a statutory close corporation that is a benefit corporation provide that the business and affairs of the corporation shall be managed by or under the direction of the shareholders, then the bylaws of the benefit corporation must provide that the person or persons or shareholders who perform the duties of a board of directors shall include a person with the powers, duties, rights and immunities of a benefit director.

(f) Exoneration from personal liability. – Regardless of whether the bylaws of a benefit corporation include a provision eliminating or limiting the personal liability of directors authorized by section 1713 (relating to personal liability of directors), a benefit director shall not be personally liable for any act or omission in the capacity of a benefit director unless the act or omission constitutes self-dealing, willful misconduct or a knowing violation of law.

Committee Comment:

The statement of the benefit director required by subsection (c) is an important part of the transparency required under this chapter. The perspective of the benefit director on whether the corporation has been successful in creating general or specific public benefit will be an important source of information for the shareholders as to whether the directors have adequately discharged their stewardship of the benefit corporation and its resources.

Subsection (d) makes clear that the actions of a benefit director are actions of a director of the benefit corporation and are subject to the same standards as actions of directors generally.

The term “act” used in this section is defined in 15 Pa.C.S. § 103 to include failure to act.

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“articles
“board of directors”
“bylaws”
“director”
“officers”
“shareholders”
“statutory close corporation”

The following terms used in this section are defined in 15 Pa.C.S. § 3302:

“benefit corporation”
“benefit director”

“benefit enforcement proceeding”

“benefit officer”

“general public benefit”

“independent”

“specific public benefit”

§ 3323. Standard of conduct for officers.

(a) General rule. – Each officer of a benefit corporation shall consider the interests and factors described in section 3321(a) (relating to standard of conduct for directors) in the manner provided in that subsection when:

- (1) the officer has discretion to act with respect to a matter; and
- (2) it reasonably appears to the officer that the matter may have a material effect on:
 - (i) the creation of general or specific public benefit by the benefit corporation; or
 - (ii) any of the interests or factors referred to in section 3321(a).

(b) Coordination with other provisions of law. – The consideration of interests and factors in the manner described in subsection (a) shall not constitute a violation of section 1712(c) (relating to standard of care and justifiable reliance).

(c) Exoneration from personal liability. – An officer is not personally liable, as such, for monetary damages for any action taken as an officer if the officer performed the duties of the position in compliance with section 1712(c) (relating to standard of care and justifiable reliance) and this section.

Committee Comment:

This section applies to all of the officers of the benefit corporation and is not limited just to the benefit officer, if any, of the benefit corporation.

The term “act” used in this section is defined in 15 Pa.C.S. § 103 to include failure to act.

The term “officer” used in this section is defined in 15 Pa.C.S. § 1103.

The following terms used in this section are defined in 15 Pa.C.S. § 3302:

“benefit corporation”
“benefit enforcement proceeding”
“benefit officer”
“general public benefit”
“specific public benefit”

§ 3324. Benefit officer.

A benefit corporation may have an officer designated the “benefit officer” who shall have such authority and shall perform such duties in the management of the benefit corporation relating to the purpose of the corporation to create general or specific public benefit as may be provided by or pursuant to the bylaws or, in the absence of controlling provisions in the bylaws, as may be determined by or pursuant to resolutions or orders of the board of directors. If a benefit corporation has a benefit officer, the duties of the benefit officer shall include preparing the benefit report required by section 3331 (relating to annual benefit report).

Committee Comment:

The authority and duties of a benefit officer may be set forth in the articles instead of, or in addition to, the bylaws. See 15 Pa.C.S. § 1504(c).

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“board of directors”
“bylaws”
“officer”

The following terms used in this section are defined in 15 Pa.C.S. § 3302:

“benefit corporation”
“benefit officer”
“general public benefit”
“specific public benefit”

§ 3325. Right of action.

(a) General rule. – The duties of directors and officers under this chapter, and the general and any specific public benefit purpose of a benefit corporation, may be enforced only in a benefit enforcement proceeding. No person may bring an action or assert a claim

against a benefit corporation or its directors or officers with respect to the duties of directors and officers under this chapter and the general and any specific public benefit purpose of the benefit corporation except in a benefit enforcement proceeding.

(b) Parties with standing. – A benefit enforcement proceeding may be commenced or maintained only:

(1) directly by the benefit corporation; or

(2) derivatively by:

(i) a shareholder;

(ii) a director;

(iii) a person or group of persons that owns beneficially or of record 10% or more of the equity interests in an association of which the benefit corporation is a subsidiary; or

(iv) such other persons as may be specified in the articles or bylaws of the benefit corporation.

(c) Cross reference. – See Subchapter F of Chapter 17 (relating to derivative actions).

Committee Comment:

Standing in actions against directors and officers of a business corporation that is not a benefit corporation for breach of duty is limited by 15 Pa.C.S. § 1717 just to the corporation or shareholders bringing a derivative suit. This section provides a similar, although slightly different, limitation on standing in actions to enforce this chapter. The limitation on standing in 15 Pa.C.S. § 1717 will continue to apply to actions against the directors and officers of a benefit corporation to the extent the action is not seeking to enforce this chapter.

This section only applies to actions or claims relating to the duties of directors and officers under this chapter, and the general and specific public benefit purposes of a benefit corporation. Lawsuits for breach of contract by directors, officers, or the benefit corporation are not subject to this section.

The cross reference in subsection (c) is a reminder that the provisions on derivative actions in 15 Pa.C.S. Subch. 17F will apply to a derivative action under this section. See 15 Pa.C.S. § 3301(c).

The term “association” used in this section is defined in 15 Pa.C.S. § 102.

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“articles”
“bylaws”
“directors”
“officers”
“shareholder”

The following terms used in this section are defined in 15 Pa.C.S. § 3302:

“benefit corporation”
“benefit enforcement proceeding”
“general public benefit”
“specific public benefit”
“subsidiary”

Subchapter D Transparency

Section

3331. Annual benefit report.

§ 3331. Annual benefit report.

(a) General rule. — A benefit corporation must deliver to each shareholder an annual benefit report including:

(1) a narrative description of:

(i) the ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created;

(ii) the ways in which the benefit corporation pursued any specific public benefit that the articles state it is the purpose of the benefit corporation to create and the extent to which that specific public benefit was created; and

(iii) any circumstances that have hindered the creation by the benefit corporation of general or specific public benefit;

(2) an assessment of the social and environmental performance of the benefit corporation, prepared in accordance with a third-party standard applied consistently with any application of that standard in prior benefit reports or accompanied by an explanation of the reasons for any inconsistent application;

(3) the name of the benefit director and the benefit officer, if any, and the address to which correspondence to each of them may be directed;

(4) the compensation paid by the benefit corporation during the year to each director in that capacity;

(5) the name of each person that owns 5% or more of the outstanding shares of the benefit corporation either beneficially (to the extent known to the benefit corporation without independent investigation) or of record; and

(6) the statement of the benefit director described in section 3322(c) (relating to benefit director).

(b) Timing of report. – The benefit report must be sent annually to each shareholder within 120 days following the end of the fiscal year of the benefit corporation or at the same time that the benefit corporation delivers any other annual report to its shareholders.

(c) Website posting. – A benefit corporation must post its most recent benefit report on the public portion of its website, if any, except that the compensation paid to directors and any financial or proprietary information included in the benefit report may be omitted from the benefit report as posted.

(d) Filing of report. – Concurrently with the delivery of the benefit report to shareholders pursuant to subsection (b), the benefit corporation must deliver a copy of the benefit report to the department for filing, except that the compensation paid to directors and any financial or proprietary information included in the benefit report may be omitted from the benefit report as filed under this section. The department shall charge a fee of \$70 for filing a benefit report.

(e) Failure to file report. – If a benefit corporation has not delivered a benefit report to the department for a period of two years, the department may prepare and file a statement that the corporation has forfeited its status as a benefit corporation and is no longer subject to this chapter. If the corporation subsequently delivers a benefit report to the department for filing, the status of the corporation as a benefit corporation shall be automatically reinstated upon the filing of the benefit report by the department and the corporation shall again be subject to this chapter.

Committee Comment:

A benefit corporation may change from year to year the standard it uses under subsection (a)(2) for assessing its performance. But if a benefit corporation uses the same standard for assessing its performance in more than one year, the standard must either be applied consistently or the benefit corporation must provide an explanation of the reasons for any inconsistent use of the standard.

Subsection (a)(5) requires the disclosure of all record shareholders that own 5% or more of the benefit corporation. The benefit corporation must also disclose in its annual benefit report any beneficial owners of 5% or more that are known to the benefit corporation, but it is not have an obligation to inquire as to the existence of any such owners.

The term “department” used in this section is defined in 15 Pa.C.S. § 102.

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“articles”
“director”
“shareholder”
“shares”

The following terms used in this section are defined in 15 Pa.C.S. § 3302:

“benefit corporation”
“benefit director”
“general public benefit”
“specific public benefit”
“third-party standard”